

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

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BARSTOW COMMUNITY HOSPITAL –  
OPERATED BY COMMUNITY HEALTH  
SYSTEMS, INC.

and

UNITED NURSES ASSOCIATION OF  
CALIFORNIA, UNION OF HEALTH  
CARE PROFESSIONALS, NUHHCE,  
AFL-CIO

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: Case No. 31-CA-26057  
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**RESPONDENT’S RESPONSE TO ORDER TO SHOW CAUSE /  
OPPOSITION TO COUNSEL FOR THE ACTING GENERAL  
COUNSEL’S MOTION TO TRANSFER PROCEEDINGS TO  
DIVISION OF JUDGES AND MOTION FOR PARTIAL SUMMARY  
JUDGEMENT**

As the Respondent in the above-captioned case, Barstow Community Hospital (hereafter, “Barstow” or the “Hospital”) hereby responds, by and through Barstow’s Undersigned Counsel, to the Order to Show Cause issued on January 22, 2013 by Associate Chief Administrative Law Judge Gerald Etchingham, and hereby opposes, by and through Barstow’s Undersigned Counsel, the Motion to Transfer Proceedings to the Division of Judges and Motion for Partial Summary Judgment (hereafter, the “Motion”) filed by Counsel for the Acting General Counsel (hereafter, for ease of reference, the “General Counsel”) on January 22, 2013.

## **BACKGROUND**

In the Motion, the General Counsel accurately sets forth the procedural history of the case now before Your Honor. Essentially, the current proceedings arise from a previous Decision and Order (hereafter, the "Decision") issued by the National Labor Relations Board (hereafter, the "Board") in which the agency directed Barstow to make an offer of reinstatement to Ms. Lois Sanders, who was formerly employed by the Hospital as an Emergency Room Registered Nurse, and make her whole for her economic losses, if any. Because of a dispute over the question of the backpay to which Ms. Sanders is entitled, the Regional Director for Region 31 (hereafter, the "Regional Director") issued a Compliance Specification that alleges total net backpay of \$40,928. The Hospital filed a timely Answer, which sets forth several Affirmative Defenses, every one of which designed, of course, to either reduce or eliminate entirely the backpay sought by the Regional Director on Ms. Sanders' behalf.

## **ARGUMENT**

To preview Barstow's arguments, as a preliminary matter, due to the current lack of a Board quorum, Your Honor should place the Motion into abeyance. To the extent Your Honor elects to rule upon the Motion, Your Honor should deny the Motion, which abounds with procedural error and

collapses upon the paradox that the allegations for which summary judgment is requested are also, by the General Counsel's own estimation, allegations that are appropriate for a hearing or the subject of Barstow's Affirmative Defenses.

The Board currently lacks the quorum required by Section 3(b) of the National Labor Relations Act, as amended (hereafter, the "Act"). As recently explained by the U.S. Court of Appeals for the District of Columbia Circuit, the appointments of Members Sharon Block and Richard Griffin violated the U.S. Constitution and the Board is unable to satisfy the quorum requirements of Section 3(b) based only upon Chairman Mark Pearce, who, of course, is the only other current Member of the Board. See Noel Canning v. NLRB, D.C. Cir. Case No. 12-1153 (January 25, 2013); New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). Because of the lack of a quorum, the Board lacks the authority to conduct any agency business. In these circumstances, the only possible authority currently possessed by Your Honor would be the authority to place the Motion into abeyance for whatever period of time the Board's lack of a quorum persists. Barstow respectfully requests that Your Honor take that step.

In the event Your Honor believes that the Board does not lack a quorum, or Your Honor concludes that the lack of quorum would not affect

Your Honor's authority, Barstow would respectfully submit that Your Honor still lacks the authority to rule upon the Motion, because, under the Board's Rules and Regulations, Your Honor lacks the jurisdiction to rule upon a motion for summary judgment. Section 102.24(a) of the Board's Rules expressly provides that **"[a]ll motions for summary judgment or dismissal made prior to the hearing shall be filed in writing with the Board pursuant to the provisions of section 102.50."** (emphasis added). The Motion has been filed prior to any hearing before an Administrative Law Judge, and therefore, under the agency's Rules, the Board holds exclusive jurisdiction over the Motion.

Under the presumption, solely for the sake of argument, that Your Honor does hold the authority to rule upon the Motion, Your Honor should deny the Motion, because, due to the absence of the statutory quorum, the Regional Director lacks the authority to seek Barstow's compliance with the Decision. For that matter, insofar as the Board lacked a quorum at the time the Compliance Specification was issued, the Regional Director lacked the authority to issue the Compliance Specification, which, as noted by the Motion, was an action taken "pursuant to the authority duly conferred upon [the Regional Director] by the Board." See Motion, page 3.

To the extent Your Honor believes that the Board does not lack a

quorum, or Your Honor concludes that the lack of quorum would not affect the Regional Director's authority to issue and prosecute the Compliance Specification, Your Honor must deny the Motion as untimely under the Board's Rules. Under Section 102.24(b) of the Board's Rules, "[a]ll **motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing.**" (emphasis added). As part of the issuance of the Compliance Specification, the hearing was scheduled for February 4, 2013. The Motion was filed on January 22, 2013, which was fourteen (14) days before the scheduled hearing date. Accordingly, the Motion was untimely, and drastically so.

The Hospital notes that, on January 22, 2013, the Regional Director issued a Postponement Order, whereby the hearing was postponed indefinitely based upon pendency of the Motion, which had been filed that same day. The fact that the hearing did not go forward on February 4, 2013 is beside the point, however. As noted by the Motion, just a few days after the Answer was filed, the General Counsel informed Barstow that the Answer was allegedly deficient under the Board's Rules. See Motion, page 4. The Hospital did not provide the additional information demanded by the General Counsel. In spite of the fact that the issue was clearly joined by that point, the General Counsel did not file the Motion. Instead, a month later,

the General Counsel parroted the very same allegations, and as before, the Hospital did not provide the additional information. Nonetheless, the General Counsel waited more than two (2) additional weeks to file the Motion. The General Counsel, like any other party, is accountable to the deadlines set forth by the Board's Rules. In the particular case at hand, the General Counsel's failure to meet the deadline is particularly inexcusable, based upon the fact the Motion is not only two (2) weeks beyond the deadline, but also given the fact that Barstow made clear from the start the Hospital had no intention to provide the additional information demanded by the General Counsel. Another point is worthy of emphasis, specifically, that Your Honor should reject any attempt by the General Counsel to argue that the untimely nature of the Motion was cured by virtue of the Postponement Order, i.e., the Motion was timely because, at the time the Motion was filed, no hearing was scheduled. The Postponement Order was issued by the Regional Director, who, of course, is the very same actor who filed the Motion. The simple fact of the matter is that the Regional Director did not timely seek summary judgment and Your Honor must reject any efforts on her part to cure the untimely nature of the Motion by a self-serving resort to her scheduling authority under the Board's Rules.

Lastly, beyond the myriad of procedural errors that, taken separately

and certainly as a whole, would require dismissal of the Motion, Barstow notes an incongruity in the General Counsel's position, as reflected by the Motion. On the one hand, the General Counsel asserts that, given the arguments set forth by the Motion, "all allegations relating to the backpay period and the computation of total net backpay must be admitted as true." See Motion, page 8. And yet, in the very next paragraph, the General Counsel effectively concedes that, in spite of the arguments set forth by the Motion, the Hospital would be entitled to a hearing on the question of "the dates of the backpay period and [the Hospital's] affirmative defenses." Id. Thus, on the question of the backpay period, the Motion both seeks summary judgment and recognizes the Hospital's entitlement to a hearing on the question. Similarly, the Motion seeks summary judgment on the question of the net backpay due, but at the same time, recognizes Barstow's rights to litigate the Hospital's affirmative defenses, which, if successful, would obviously affect the net backpay due. Simply put, the Motion is effectively defeated by itself.

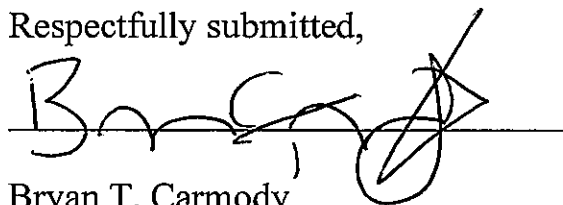
### **CONCLUSION**

Because of the current lack of a quorum, Barstow respectfully requests that Your Honor place the Motion in abeyance. Alternatively, to the extent Your Honor elects to rule upon the Motion, Barstow respectfully

requests that, for any one or all of the reasons set forth above, Your Honor deny the Motion with prejudice.

Dated: Glastonbury, Connecticut  
February 12, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bryan T. Carmody', is written over a horizontal line. The signature is stylized with a large 'B' and a circular flourish at the end.

Bryan T. Carmody  
Attorney for Respondent  
134 Evergreen Lane  
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**CERTIFICATE OF SERVICE**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the Respondent's Response to Order to Show Cause / Opposition to Counsel for the Acting General Counsel's Motion to Transfer Proceedings to Division of Judges and Motion for Partial Summary Judgment (hereafter, the "Response / Opposition") was e-filed this date by Barstow Community Hospital with the following through the website of the National Labor Relations Board ([www.nlrb.gov](http://www.nlrb.gov)):

Hon. Gerald Etchingham  
Associate Chief Administrative Law Judge  
901 Market Street, Suite 300  
San Francisco, California 94103-1779

The Undersigned further certifies that, on this date, a copy of the Response / Opposition was served upon Counsel for Charging Party by email, as follows:

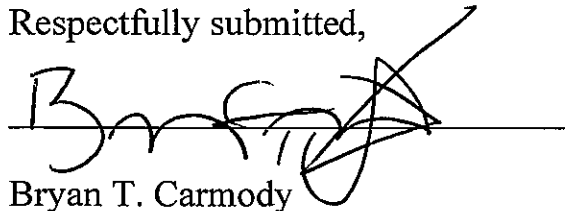
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Dated: Glastonbury, Connecticut  
February 12, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bryan T. Carmody', is written over a horizontal line.

Bryan T. Carmody  
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